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No. 90-953

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner,

v.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The written consent of the petitioner, City Gas Company, has been obtained. The consent of the respondent, Consolidated Gas Company, was requested, but refused.

EEI is the association of the nation's investor-owned electric utility companies. EEI has not participated previously in the instant case either as a party or as *amicus curiae*. However, several member companies of EEI prepared and filed a brief *amicus curiae* in support

of the petitioners when the case was pending before the Eleventh Circuit Court of Appeals sitting *en banc*.

EEI is concerned that the circuit court's decision will have significant impact on electric utilities that are subject to state regulation of service, price, territories and other aspects of their businesses. As pervasively regulated entities, EEI's members are vitally interested in the standards for the application of the state action immunity doctrine to state regulatory processes and the activities of regulated entities pursuant to those processes.

In addition, EEI's members have developed and operate extensive networks of electric transmission and distribution facilities which may be subject to claims under the so-called essential facilities doctrine. In view of EEI members' significant investment in these facilities on behalf of their customers, EEI has a keen interest in the evolution of monopolization principles applicable to regulated public utilities, and in particular, in the possible recognition of the essential facilities doctrine as an independent form of monopolization analysis.

EEI believes that the brief it seeks permission to file will present the Court with useful discussion of several issues which are not likely to be contained in the briefs of the parties. These issues include: a discussion of the likely effect of the circuit court's decision on other state utility territorial statutes; a suggested standard for determining whether state regulatory schemes constitute sufficient state action for purposes of applying state action immunity; a discussion of the federalism implications of the lower court's state action standard; and a discussion of the adverse effect that the circuit court's use of the "essential faciilties" theory would have on regulated entities.

This the 15th day of February, 1991.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") is the association of the nation's investor-owned electric utility companies. Its members generate approximately 78 percent of all electricity in the country and serve 74 percent of the nation's electricity users.

The members of EEI are subject to extensive service and price regulation at the state level. As electric utilities subject to state regulatory supervision, the members of EEI are concerned that the decision of the circuit court will have impact far beyond its direct effect on two gas suppliers in Florida. The circuit court's decision significantly and improperly restricts the protection afforded to regulated private parties by the state action doctrine and,

in so doing, may put investor-owned utilities at risk of antitrust litigation for actions taken in compliance with state regulatory policy. Moreover, the circuit court's holding may further affect regulated utilities by unduly burdening and interfering with the proper functioning of the state mechanisms that regulate virtually every aspect of the electric utility industry.

In addition, EEI's member companies have developed and operate vast networks of electric transmission and distribution facilities. These facilities are vital to the provision of reliable electric service to utility customers in all parts of the nation. In recent years, however, EEI members have been confronted with conflicting demands for access to these facilities from independent generators of electricity and wholesale customers whose demands are frequently at odds with the interests of utility retail customers. These demands are often accompanied by threats of antitrust suits if the demands are not met. EEI believes that the circuit court's misguided application of the "essential facilities" doctrine creates dangerous uncertainty concerning the legal standard applicable to such demands. If not corrected, this uncertainty and the resulting treble damage exposure is likely to skew decision-making regarding requests for access to transmission facilities, and may force utilities to grant access to such facilities without proper regard for the reliability, economic and consumer welfare concerns that should guide these decisions.

SUMMARY OF ARGUMENT

EEI files this brief as *amicus curiae* to express its concerns over the holding below, which resulted from the *en banc* circuit court's inability to reach agreement concerning the basic issues in this case. The approach taken by the panel, which was affirmed per curiam by the *en banc* court, is inconsistent with the federalism concerns that underlie the *Parker* doctrine because it needlessly embroils the federal courts in the interpretation of state statutes, even when such statutes have already been

clearly interpreted by the highest court of the state. Moreover, the decision below reflects an unwarranted federal court mistrust of state administrative processes.

EEI also takes issue with the circuit court's misguided monopolization analysis. By focusing on facilities rather than markets, the decision obligates Petitioner to deal in a market in which it had not previously participated, without analyzing the extraordinary implications of such a pronouncement. In addition, the decision creates considerable uncertainty concerning the circumstances under which a utility's facilities may be viewed as "essential" and the terms upon which they must be shared with competitors.

ARGUMENT

The Eleventh Circuit was sharply divided over the central issues in this case, with three Judges dissenting, two Judges concurring in part and dissenting in part, and only five Judges agreeing to affirm completely. In fact, five Judges would have found *Parker* immunity with respect to the territorial agreement. The division on all points, and the strong and well-reasoned dissent of the Chief Judge, indicate a pressing need for additional guidance from this Court concerning the application of the state action and essential facilities doctrines to regulated public utilities.

I. THE CIRCUIT COURT'S DECISION DISTORTS THE STATE ACTION DOCTRINE AND INTERFERES WITH STATE REGULATION OF UTILITIES

The circuit court in 1989 should have found City Gas to be exempt from the federal antitrust laws for the same reasons that the Florida Supreme Court found City Gas to be exempt from the state antitrust laws in 1965. The Florida Supreme Court acknowledged in its 1965 decision that the territorial agreement between City Gas and Peoples Gas could be viewed as inconsistent with the state antitrust laws. After examining the provisions of

chapter 366 of the Florida statutes [1], however, the court determined that the extensive authority of the Florida Railroad and Public Utilities Commission (now the Florida Public Service Commission ("FPSC")) over the fortunes and operations of regulated utilities was sufficient to ensure that gas suppliers in Florida did not have "monopolistic control over prices, production, or quality of service." *City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d 429, 435-6 (Fla. 1965). The court therefore sustained the FPSC's approval of the very territorial agreement at issue in this case.

For nearly fifty years, the *Parker* doctrine has represented in federal antitrust law "a judicially crafted accommodation of state sovereignty." [2] The failure of the lower courts, in this case, to apply the protection of the state action doctrine to a territorial agreement permitted by a state statutory framework, approved by a state public service commission [3], and upheld by a state supreme court has alarming implications because it radically alters both aspects of the *Midcal* formulation.[4]

A. Clear Articulation

In reinstating the panel opinion, the circuit court approved the district court's conclusion that no *"clearly* articulated state policy authorized this [territorial] agreement." *Consolidated Gas Co. v. City Gas Co.*, 880 F.2d 297, 303 (11th Cir. 1989) (panel opinion) (emphasis in

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[1] *Fla. Stat.* ch. 366 (Supp. 1990).

[2] Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 228 (1987) (citing *Parker v. Brown*, 317 U.S. 341 (1943)).

[3] The territorial agreement entered into by City Gas and Peoples Gas was submitted to and formally approved by the FPSC. *See FPSC Order No. 3051*, Docket No. 6231-GU (1960) (Pet. App. I). Under settled Florida law, that agreement thereupon became an *order* of the FPSC which could not be deviated from without the prior approval of the FPSC. *Peoples Gas Sys., Inc. v. Mason*, 187 So.2d 335 (Fla. 1966).

[4] *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 87 (1980).

original). According to the panel, the absence of express statutory authorization for gas territorial agreements and the uncertainty with which the FPSC approached territorial disputes muddied the question of whether Florida lawmakers intended to permit territorial regulation. As Petitioner notes,[5] the circuit court reached this conclusion by ignoring a controlling decision of the Florida Supreme Court holding that Florida lawmakers did intend to permit regulation of utility service areas.[6]

The Florida decision should have ended the inquiry because, as long as the state sovereign clearly intends to displace competition with a regulatory structure in a particular field, the first prong of the *Midcal* test is satisfied. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Consolidated Gas*, 912 F.2d 1262, 1265 (11th Cir. 1990) (en banc) (Johnson, J., dissenting in part); *id.* at 1331-33 (Tjoflat, C.J., dissenting). Given the Florida Supreme Court's clear interpretative guidance concerning the FPSC's authority to approve territorial agreements, the circuit court should have refrained from independently analyzing Florida law. As this Court has cautioned,

> [r]equiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the funda-

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[5] Petition at 16 (citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) (quoting *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) ("We may not 'construe a state statute contrary to the construction given it by the highest court of a State.' ")).

[6] *See City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d at 436. Indeed, this controlling Florida decision is but one of a long line of Florida decisions confirming the FPSC's "effective control over areas of [utility] service," and approving the FPSC's efforts to prevent wasteful duplication of utility distribution facilities. *See id.*; *see, e.g., Lee County Electric Coop. v. Marks*, 501 So.2d 585, 587 (Fla. 1987).

> mental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44 n.7 (1985). Instead, the circuit court undertook to embroil itself in second-guessing the Florida court's view of Florida law.[7]

In *Town of Hallie* this Court acknowledged that it had never "fully considered precisely how clearly a state policy must be articulated . . . to establish that [an] anticompetitive activity constitutes state action." 471 U.S. at 42. In considering that issue, the Court held that a state statute need not explicitly declare legislative intent to supplant competition with regulation. Rather, it is sufficient if a reading of the statute indicates that the state legislature "clearly contemplate[d]" anticompetitive activity, or that such conduct is a "foreseeable" or "logical" result of the authority delegated. *Id.* In their dissents from the circuit court's opinion, Judges Tjoflat and Johnson both employed this test and concluded that the district court's interpretation of the legislative intent behind chapter 366 overemphasized the absence of an express power to approve territorial agreements between natural gas suppliers. *Consolidated Gas*, 912 F.2d at 1265 (en banc) (Johnson, J., dissenting in part); *id.* at 1329 (Tjoflat, C.J., dissenting). Based upon a reading of this Court's decisions in *Southern Motor Carriers* and *Town of Hallie*, Judge Tjoflat found that Florida's utility statutes reflected a decision to displace competition with

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[7] Even if the Florida Supreme Court had not previously and repeatedly spoken so directly to the scope of FPSC's authority, the circuit court should have refrained from attempting to draw negative inferences from internal comparisons of various state utility statutes. Surely the circuit court's heavy emphasis on legislative silence must be contrary to this Court's teaching in *Town of Hallie* because it "embodies an unrealistic view of how legislatures work and of how statutes are written." 471 U.S. at 43.

a broad regulatory structure satisfying the "clearly articulated" requirement of the state action doctrine.[8] *Id.*

The conclusions of the Florida Supreme Court, Judge Johnson and Judge Tjoflat are in harmony with the approach that most states take in regulating utility service territories. States typically limit competition between utilities through control over utilities' service areas in order to ensure that each regulated utility will have an economically efficient number of customers, to facilitate long-term planning by stabilizing utility service territories, to minimize the building of environmentally intrusive facilities, and to reduce the costs to utility customers of duplicative facilities. In return for the exclusive right to serve a particular area and as part of the regulatory compact, a utility has "an obligation to serve, fairly and without undue discrimination, all members of the public it holds itself out to serve . . .," [9] with adequate and reliable service. State regulators are responsible for assuring that the rates and charges of a utility are reasonable and for enforcing a utility's service obligations. *Cf. Duquesne Light Co. v. Barasch*, 109 S. Ct. 609 (1989).

In fact, the states have dealt with the regulation of utility service areas in a variety of ways. Some state statutes establish territorial boundaries on the basis of fixed rules with little or no involvement of a state public service commission. *See, e.g., Ala. Code* §§ 37-14-1 and 37-14-30 (1988) (suppliers required to provide service based upon fixed rules such as the proximity of a cus-

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[8] Confirming the FPSC's jurisdiction over territorial agreements between electric suppliers, in 1974 the Florida Legislature expressly authorized Commission jurisdiction over territorial agreements between rural electric cooperatives, municipal electric suppliers, and other electric suppliers. 1974 Fla. Laws 196. The circuit court panel opinion acknowledged that its decision should not "in any way be read to cast doubt" on the proposition that electric utilities are exempt from the Sherman Act. *Consolidated Gas*, 880 F.2d at 301-2 (panel opinion).

[9] A.J.G. Priest, *Principles of Public Utility Regulation*, Vol. I at 228 (1969).

tomer to an existing line); *Idaho Code* § 61-332 (1976) (new customers allocated to utilities under statutory rules based on the distance between the customer and the nearest power distribution line). Other state statutes do not expressly establish service territories but provide instead that before a utility builds any new line, plant or system it must obtain a certificate of public convenience and necessity from a public service commission. In these instances, states simply approach the issue of duplicate facilities on a case-by-case basis as part of the overall regulation of utility service. *See, e.g., Colo. Rev. Stat.* § 40-5-101(2) (1963) (*as interpreted by Town of Fountain v. Public Util. Comm'n.*, 167 Colo. 302, 447 P.2d 527 (1968) (no express creation of service territories but state may assign territories on its own motion or the motion of private parties)); *Mich. Stat. Ann.* § 22,142 (Callaghan 1984) (no direct territorial legislation, but certificate of convenience and necessity mechanism interpreted as being "designed to prevent needless multiplication of companies serving the same territory." *Indiana & Michigan Elec. Co. v. Miller*, 19 Mich. App. 16, 172 N.W.2d 223, 226 (1969)). In yet other instances, public service commissions are empowered to review and approve territorial agreements which are initially developed by affected electric suppliers. *See, e.g., Neb. Rev. Stat.* § 70-1002(3) (1989) (electric suppliers encouraged to enter contracts establishing service territories which must be approved by Power Review Board).

State legislatures have obviously found many different voices to articulate the idea that utility regulation can and should discourage inefficient duplication of electric facilities. Indeed, the virtual chorus of such voices is indicative of the fact that the regulation of rates and the provision of exclusive service territories are complementary regulatory tools. Thus, as the Florida Supreme Court held, the Florida Legislature's former statutory silence on the precise role of the FPSC in the creation of gas service territories should be seen as neither unique nor determinative of legislative intent.

The applicability of state action immunity to regulated public utilities should depend on whether a state legislature has articulated a clear intent to regulate public utilities and whether it is reasonably foreseeable that such regulation may displace competition. *See Town of Hallie*, 471 U.S. at 42-43 (anticompetitive effects can logically result from broad authority to regulate) (citing *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (no express intent to displace the antitrust laws, but statute provided regulatory structure that inherently "displace[d] unfettered business freedom")). Under Section 366 of the Florida Statutes, City Gas clearly does not have unfettered business freedom and the power of the Commission to approve territorial agreements flows inexorably from the virtually "omnipotent" regulatory powers of the FPSC. *See Storey v. Mayo*, 217 So.2d 304, 307 (Fla. 1968).

B. Active Supervision

The circuit court compounded the potential damage of its decision to public utilities by holding that even if the first prong of *Midcal* had been satisfied, the territorial agreement was not actively supervised: "The minimal contact the Commission has had with this agreement is nothing more than a 'gauzy cloak of state involvement' which does not protect it from the constraints of federal antitrust regulation." *Consolidated Gas*, 880 F.2d at 303 (panel opinion). The circuit court's conclusion is at odds with the active supervision standard applied by this Court as well as various courts of appeals, and reflects a serious misunderstanding of the doctrine's theoretical underpinnings.

It is now clear that "the requirement of active supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie*, 471 U.S. at 46. While this Court occasionally has used the metaphor that the active supervision requirement is necessary to prevent a state from circumventing

the Sherman Act's proscriptions "by casting . . . a gauzy cloak of state involvement over what is essentially a private . . . [anticompetitive] arrangement," it has never held, as did the circuit court, that a state regulatory agency can be found to have cast a "gauzy cloak" over private conduct when it both reviews and expressly approves the precise conduct under challenge. *Id.* at 34-5 (quoting *Midcal*, 445 U.S. at 106).

Indeed, it is an absurdity to rely on the "gauzy cloak" metaphor when applying the state action doctrine to the heavily regulated utility industry. This Court's decisions dealing with the "cloaking" of private conduct addressed situations in which states failed to provide *any* governmental means of reviewing private decisions. *See, e.g., Midcal*, 445 U.S. at 106 (California's wine pricing system simply authorized private price setting and accepted without question the prices established by private parties); *Patrick v. Burget*, 108 S. Ct. 1658 (1988) (no forum for substantive review of the decisions of a private peer review board); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 (1987) (no supervising state agency to monitor private pricing decisions). In each of these cases, the state's regulatory blessing was given *before* the terms of the anticompetitive private conduct were even established, and no subsequent review of the private conduct was provided for. These decisions in no way imply that the active supervision test necessitates an inquiry into "whether a particular state's regulatory operation demonstrates satisfactory zeal and agressiveness" or that it necessitates placing the state regulator on trial. *New England Motor Rate Bureau Inc. v. FTC*, 908 F.2d 1064, 1075 (1st Cir. 1990). While "the mere presence of some state involvement or monitoring does not suffice," private anticompetitive conduct must be sheltered if "the State exercises *ultimate control* over the challenged conduct." *Patrick v. Burget*, 108 S. Ct. at 1663 (emphasis added). The fact that a public service commission has the ultimate authority over rates, service and service areas is more than sufficient to provide

a "realistic assurance that [the utility's] anticompetitive conduct promotes state policy." *Id.*; *cf. Southern Motor Carriers*, 471 U.S. at 51 (noting with approval that state public service commissions had "ultimate" authority over rates); *Fuchs v. Rural Electric Convenience Coop.*, 858 F.2d 1210, 1218 (7th Cir. 1988), *cert. denied* 109 S. Ct. 1744 (1989).[10]

EEI is especially troubled by the circuit court's suggestion that private conduct may lose state action immunity because the state failed to "look" hard enough at the data, or by the mere passage of time: "simply because the Commission has on occasion, some 15 to 25 years ago, looked at this agreement does not automatically immunize it from federal antitrust scrutiny." *Consolidated Gas*, 880 F.2d at 303 (panel opinion). The Commission in this case did far more than just "look" at the territorial agreement—the Commission both reviewed and approved the agreement. Moreover, after the agreement was approved, any aggrieved member of the public could have sought modification or termination of the agreement by the Commission on the grounds that it was no longer in the public interest.[11]

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[10] Just as in *Southern Motor Carriers*, where this Court held that a private party acting pursuant to an anticompetitive regulatory policy "need not 'point to a specific, detailed legislative authorization' of its challenged conduct" to satisfy the first prong of *Midcal*, a private party should not need to point to a specific, detailed approval from a state regulatory agency to show that the state established a mechanism to oversee the implementation of the state's anticompetitive policy. 471 U.S. at 64 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 435 (1978) (opinion Brennan, J.)). As long as the state has established a mechanism of legislative or regulatory oversight which can ensure that private parties will further state regulatory policies, it should be deemed to have satisfied the active supervision requirement.

[11] *Peoples Gas Sys., Inc. v. Mason*, 187 So.2d 335, 339 (Fla. 1966). The active supervision analysis should focus on the availability of state corrective processes and not the litigants' decision to use or forego those processes. *See Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) ("A contrary rule would tempt aggrieved

The lower court also must be wrong in suggesting that regulatory approvals once obtained may at some point go stale.[12] By their very nature, territorial agreements are designed to provide long term stability, yet the circuit court's formulation would require state regulatory agencies to reassess previously approved conduct even if no circumstances had changed to warrant reassessment and no aggrieved party had sought regulatory review. The standard implicit in the Eleventh Circuit's holding would breed inefficiency and unnecessarily burden state regulatory agencies. More importantly, it would improperly require federal courts to dictate standards governing the frequency of review by state regulatory agencies. The circuit court's view that the age of the regulatory approval somehow bears on the validity of that approval should be rejected.

As professors Areeda and Turner have noted, the circuit court's evaluation of the frequency and quality of regulatory consideration would undermine the principles upon which *Parker* is based:

> [F]or many of the same reasons that the Supreme Court refuses strictly to scrutinize state economic regulation under the Fourteenth Amendment, so must the antitrust court accept the state's apparent supervision on its face. There simply is no way to tell if the state has "looked" hard enough at the data, and there certainly are no manageable judicial standards by which a court may weigh the various elements of

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parties to forego available state corrective processes in hopes of obtaining treble damages"). As the First Circuit recently observed, the "absence of complaints in the face of an available procedure to resolve them supports an inference that the state is actively supervising." *New England Motor Rate Bureau*, 908 F.2d at 1075.

[12] The decision offers no guidance for determining how often and to what level of detail such reviews would have to be conducted in order to satisfy the various antitrust tribunals that might ultimately review the quality and frequency of state regulatory oversight. For example, would the court have found the City Gas/Peoples agreement immune if the Commission had "looked" at the agreement five years ago but not six years ago?

> a "public interest" judgment in order to determine whether the legislature or agency decision was correct. Those are political judgments and ought to be made by the legislature and its delegates.

P. Areeda & D. Turner, *Antitrust Law* § 213c at p. 75 (1978). Like the compulsion standard considered in *Southern Motor Carriers*, a stringent active supervision standard such as the one advanced by the circuit court would severely reduce the "range of regulatory alternatives available to the [states]." *See Southern Motor Carriers*, 471 U.S. at 48.

According to the circuit court's analysis, utilities erecting and operating facilities in an exclusive territory approved by their regulators may be on shifting and dangerous sands. At any given moment, a regulatory scheme—and the utilities that must operate within that regulatory scheme—could become vulnerable to attack if regulators are deemed, after-the-fact, to have been deficient in their oversight. EEI submits that federal antitrust courts would be wise to look to the nature and structure of the regulatory system that the legislature created, rather than to the frequency of subsequent regulatory reviews or the diligence and subjective perceptions [13] of state officials charged with carrying out the legislature's objectives. To do otherwise places utilities in the impossible position of second-guessing the efficacy of state regulation and provides an invitation "to place regulators on trial."

The decision below must be viewed for what it is: "a means for federal oversight of state officials and their programs." *New England Motor Rate Bureau*, 908 F.2d at 1071. The circuit court's formulation would turn the state action doctrine on its head. "Instead of being a doctrine of preemption, allowing for the state's own action," it would become a hostage to temporal concerns

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[13] The circuit court should not have been concerned, as it apparently was, with the FPSC's expression of doubt about the authority it in fact exercised over territorial disputes. *See Consolidated Gas*, 880 F.2d at 303 (panel opinion).

about how and when a particular commission exercised the power delegated by the legislature. *Id.* The circuit court's decision regarding the application of the state action doctrine cannot be reconciled with this Court's view of the active supervision test, and undermines the federalism principles upon which the state action doctrine is based.

II. THE LOWER COURTS MISAPPLIED THE LAW OF MONOPOLIZATION

The liability findings against City Gas were premised, in large measure, on the lower courts' invocation of the four-part test of the so-called essential facilities doctrine. Both the district court and the circuit court labeled City Gas' pipeline facilities as an essential facility, and predicated liability on City Gas' refusal to afford its competitor reasonable access to that facility.[14] The courts below plainly viewed the essential facilities test as an independent and distinct tool of monopolization analysis [15] which directs the courts to focus their inquiry on particular "facilities." EEI respectfully submits that such an approach is both incorrect and dangerous because it encourages antitrust courts to short-cut proper monopolization analysis and rely instead on the mechanical application of labels to impose treble damage liability. In this case, such an approach effectively imposed an affirm-

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[14] *See Consolidated Gas*, 880 F.2d at 301 (panel opinion) (City Gas' "massive system of pipes" referred to as an essential facility); 665 F. Supp. 1493, 1534 (S.D. Fla. 1987) (district court opinion) ("pipeline that transported wholesale gas" was an essential facility). It is interesting to note that the district court suggested elsewhere in its opinion that natural gas (rather than the wholesale pipeline) was the essential facility. *See Id.* at 1537 ("natural gas, as opposed to any type of gas, is an essential facility"); *see also* 912 F.2d at 1292 n.31 (en banc) (Tjoflat, C.J., dissenting). The court's apparent confusion only reinforces EEI's concern that unprincipled application of labels may distort proper monopolization analysis.

[15] *See Consolidated Gas* 665 F. Supp. at 1532 (essential facilities doctrine referred to as one of "two distinct lines of cases" imposing a duty to deal).

ative duty to help rivals by requiring City Gas to enter a market in which the firm had not previously participated.

This Court has never applied the essential facilities doctrine as an independent tool of monopolization analysis, and indeed, has never endorsed the doctrine at all. *See* G. Werden, "The Law and Economics of the Essential Facility Doctrine," 32 ST. LOUIS U.L.J. 433, 481 (1987). One scholar recently observed that most Supreme Court cases invoked in support of the doctrine "do not speak of it and can be explained without reference to it." P. Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 ANTITRUST L.J. 841 (1990). Commentators have strongly criticized the doctrine,[16] or have urged that it be narrowly applied.[17] At a minimum, these authorities counsel strongly against the broad but standardless application of the doctrine sanctioned by the circuit court.

Judge Tjoflat correctly recognized the potential distortion of monopolization law that may result from mechanical application of the "shorthand formula" of the essential facilities doctrine, and his observations in this regard are consistent with those of other federal courts and commentators. *See Consolidated Gas*, 912 F.2d at 1287 & n.26 (en banc) (Tjoflat, C.J., dissenting); P. Areeda & H. Hovenkamp, *Antitrust Law* § 736.1a at 701 (Supp. 1989) (essential facilities doctrine described as a label "that beguiles some commentators and courts into pronouncing a duty to deal without analyzing the implications."). In *City of Malden v. Union Electric Co.*, 887 F.2d 157 (8th Cir. 1989), for example, the Eighth Circuit approved a jury instruction emphasizing that the essential facilities

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[16] G. Werden, 32 ST. LOUIS U.L.J. at 480; M. Boudin, "Antitrust Doctrine and the Sway of Metaphor," 75 GEO. L.J. 395, 401-02 (1986) ("Even the Antitrust Division, once a fervent apostle of the bottleneck doctrine, is beginning to have second thoughts.")

[17] *See, e.g.*, P. Areeda, 58 ANTITRUST L.J. at 852 ("Compulsory access, if it exists at all, is and should be very exceptional.")

doctrine can be understood only in the context of the relevant market:

> Plaintiff contends this instruction confused the jury because the concept of geographic market is irrelevant to its bottleneck theory of monopoly, which in plaintiff's view focuses solely on the existence of practical alternatives to an essential facility. Our review of the essential facilities caselaw convinces us that the trial court did not err in placing plaintiff's bottleneck theory in the context of the relevant market. . . . In each of the above-cited cases, the court considered the relevant product and geographic markets in determining whether the defendant exercised monopoly control over the facility in question.

Id. at 162 (citations omitted); *see also Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 494-95 & n.11 (4th Cir. 1986) (labels not a substitute for proper market analysis). The lower courts employed the essential facilities doctrine as an independent tool of analysis, and in so doing, departed from established precedent and pronounced a duty of City Gas to deal without analyzing the far reaching implications of that pronouncement.

Although the district court purported to follow the traditional approach to defining the relevant product and geographic markets,[18] it ignored that analysis when it began to discuss the essential facilities doctrine. Rather than focusing on the wholesale gas market and City Gas' alleged power in that market, the court analyzed the fa-

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[18] EEI certainly agrees with Petitioner and Judge Tjoflat that City Gas must have had monopoly power in the *wholesale market* in order for it to be viewed as a monopolist that controlled an essential facility. In this regard, the circuit court's finding that City Gas had such power even though it never acted as a wholesale seller is shocking. *See Consolidated Gas*, 880 F.2d at 300-01 (panel opinion) ("that City Gas never actually sold any gas under this agreement does not obscure that it had the *power* to do so."). The circuit court erroneously seemed to equate the power to *enter* the market with the power to control price and exclude competition in that market.

cility—a pipeline used for retail gas sales—and assumed that Consolidated was entitled to use that facility for wholesale purchases.[19] As Judge Tjoflat stated it, "the district court took its findings concerning the conditions necessary to enable Consolidated to compete with City Gas and used them as a basis for constructing a relevant (but hypothetical) market." 912 F.2d at 1280 (en banc) (Tjoflat, C.J., dissenting).[20] By focusing on City Gas' facilities rather than its role in and power over the wholesale market, the lower courts fashioned a duty to deal that had the startling effect of forcing City Gas to enter the wholesale business for the first time.

The Eleventh Circuit's holding that City Gas' pipeline facilities were essential also represents an unprecedented and counterproductive extension of the law of monopolization. Even in the handful of decisions that have applied the essential facilities doctrine, the courts have required a high degree of impracticability and infeasibility before characterizing a particular facility as essential. *Compare MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1983) (millions of miles of cable; regulatory authorization to duplicate could not be obtained) *with Flip Side Productions, Inc. v. JAM Productions, Ltd.*, 843 F.2d 1024, 1034 (7th Cir. 1988) (arena not essential facility where alternatives were available). Commentators have likewise urged that facilities should be regarded as essential only if they are vital to competitive viability:

> Because the focus of the antitrust laws is always on competition, an essential facility is, at a minimum, a resource possessed by the defendant that is vital to the plaintiff's competitive viability. Obviously, the

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[19] *See Consolidated Gas*, 912 F.2d at 1271 n.7 (*en banc*) (Tjoflat, C.J., dissenting) ("Perhaps the problem was that Consoliated's expectations, which the district court seems to have adopted, were entirely unreasonable.")

[20] The circuit court employed similarly incorrect reasoning. *See Consolidated Gas* 880 F.2d at 301 (panel opinion).

> defendant's resource is not vital if an equivalent is available from other sources. Nor is it essential if the plaintiff can compete effectively without it. The plaintiff must show that the desired resource is not just helpful but vital to his competitive viability. Unless vital, moreover, competition would be increased by encouraging the plaintiff or others to develop rival facilities rather than to take the easier and less competitive course of obtaining access to another's facilities.

P. Areeda & H. Hovenkamp, *Antritrust Law* § 736.2(b) (Supp. 1990). The more lenient standard employed below wrongly suggests a duty to deal on the basis of the convenience or the subjective preferences of the firm seeking access to the facility. *See Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986) ("Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches."). Such a standard would penalize firms that take the initiative and risk to build facilities that produce market efficiencies, and would thereby "compel the very sloth [the antitrust laws] were intended to prevent." *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied* 444 U.S. 1093 (1980); P. Areeda, 58 ANTITRUST L.J. at 851 ("required sharing discourages building facilities . . . even though they benefit consumers.").

The decision below is also troublesome in its conclusion that City Gas effectively denied the use of its pipeline facilities because City Gas and Consolidated could not agree on a wholesale price. The district court found that City Gas' proposal amounted to an unreasonable refusal to deal even though the court did not decide what a reasonable price would have been. *Consolidated Gas*, 665 F. Supp. at 1534. While the articulation of a standard

of reasonableness in this context is admittedly difficult,[21] the result of the court's decision to dodge the issue may be to condemn firms controlling such "essential facilities" to provide rivals with unwarranted access to these facilities or face treble damage claims.

The circuit court's application of the essential facilities doctrine has potentially far-reaching implications. The essential facilities doctrine increasingly has been the focus of federal court litigation, not only in the electric utility industry but in other industries which have undergone partial deregulation such as the natural gas, telephone, railroad and airline industries. The doctrine also has been applied in the administrative context as part of the federal agencies' efforts to apply antitrust principles.[22] Although the essential facilities doctrine has been the subject of considerable judicial and academic debate, the lower federal courts and federal agencies have not had definitive guidance from this Court on such basic issues as whether the doctrine may be applied as an independent theory of monopolization law, what makes a facility "essential," and what makes denial of access unreasonable. It is clear from the circuit court's misunderstanding of the essential facilities doctrine that the writ should be issued in order for the Court to resolve the issues left for another day in *Aspen Skiing.*[23]

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[21] *Cf. Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 27 (1st Cir. 1990) ("What antitrust benefit would be gained by permitting juries to speculate" concerning what constitutes a fair rate of return?); *Consolidated Gas*, 912 F.2d at 1318-19 (en banc) (Tjoflat, C.J., dissenting).

[22] *See, e.g., Utah Power & Light Co.*, 45 FERC ¶ 61,095 (1988).

[23] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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